No. 15828

United States
Court of Appeals
for the Ninth Circuit

WM. A. SMITH CONTRACTING CO., INC., a corporation, and WM. A. SMITH CONTRACTING COMPANY OF CALIFORNIA, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, Appellants,

vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN C. CURTIS and RACHEL CURTIS, a copartnership, doing business as Curtis Gravel Company, Appellees.

BRIEF FOR APPELLANTS

Upon Appeal from the United States District Court for the District of Oregon

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vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN C. CURTIS and RACHEL CURTIS, a copartnership, doing business as Curtis Gravel Company, Appellees.

BRIEF FOR APPELLANTS

Upon Appeal from the United States District Court for the District of Oregon

BASIS OF JURISDICTION

This action originated in the United States District Court for the District of Oregon by the filing by Appellees of a complaint wherein they sought to recover under a contract between themselves and Appellants the aggregate sum of Twenty-Eight Thousand Two Hundred Eighty-Seven and 51/100 Dollars ($28,287.51), to-

gether with interest. The jurisdiction of the court was based upon diversity of citizenship under Title 28, U.S. Code, Judiciary and Judicial Procedure, Section 1331, in that Appellees were citizens of the State of Washington while Appellants were Missouri and California corporations. The District Court entered a pre-trial order on January 30, 1956, which set out the admitted facts (R. 3-7) and defined the specific issues to be tried (R. 8-19). The case was tried to the Court without a jury in January and February, 1956, and on March 4, 1957, the trial court rendered its opinion (R. 23-25). Findings of fact and conclusions of law (R. 25-23) and judgment (R. 32-33) were entered on May 6, 1957. On January 4, 1957, notice of appeal from a part of the judgment (R. 34) with undertaking, was filed in the office of the Clerk of the District Court. This Court has jurisdiction of the appeal under the provisions of Section 1291 of Title 28, U.S. Code, Judiciary and Judicial Procedure.

STATEMENT OF THE CASE

Appellant, on January 31, 1951, contracted as a prime contractor to furnish labor and materials in the relocation of a part of the Southern Pacific Railroad main line necessitated by the construction of the Lookout Point Dam in Lane County, Oregon. (Def. Ex. 1). The other party to the contract was the United States of America acting by and through the Corps of Engineers of the United States Army, hereinafter referred to as the "Army Engineers".

Thereafter, and by instrument dated June 10, 1951, Appellee contracted with Appellant, as a sub-contractor,

to perform certain parts of Appellant's contract (Def. Ex. 2). Appellee agreed to furnish, among other things, all of the ballast material required for the job and to load the material into railroad cars to be furnished by Appellant at the cost of $2.20 per cubic yard.

Appellee crushed and stockpiled a quantity of the ballast material and against the protests of Appellant and before the job was completed, removed the crushing plant and crushed no more ballast material. Appellant was compelled to procure an additional amount of the ballast material from commercial sources in order to complete the prime contract. The additional cost of the ballast material so procured was charged to Appellee by Appellant.

Appellee, in loading the material into the railroad cars, found it necessary to move the cars under the loading apparatus and did so for a time but refused to move the cars during the period while loading was still in progress. Appellant thereupon moved the cars during the remainder of the loading operation and charged the cost thereof to Appellee.

Appellee made demand upon Appellant for the sum of Eleven Thousand Seven Hundred Forty-Two and 77/100 Dollars ($11,742.77) composed of Nine Thousand Eight Hundred Seventy-Two and 70/100 Dollars ($9,872.70) withheld for the extra cost of ballast material and the sum of One Thousand Nine Hundred Sixty-One and 81/100 Dollars ($1,961.81) as the cost of moving the cars. Appellee also made demand upon Ap-

pellant for the sum of Seventeen Thousand Eighty-Five and 28/100 Dollars ($17,085.28) representing the reasonable value of labor, equipment and services furnished by Appellee in other work outside the scope of the subcontract. Appellant submitted the claim for the extra work to the Army Engineers and that governmental agency approved the claim in the lesser sum of Fourteen Thousand Five Hundred Eighty-Two and 92/100 Dollars ($14,582.92).

Appellee thus sought to recover in this proceeding Eleven Thousand Seven Hundred Forty-Two and 77/-100 Dollars ($11,742.77) plus interest and the sum of Fourteen Thousand Five Hundred Eighty-Two and 77/-100 Dollars (14, 582.92) plus interest.

The case was tried before the court and the court held that Appellee was entitled to recover from Appellant the sum of Nine Thousand Eight Hunderd Sixty-Seven and 87/100 Dollars (9,867.87) with interest thereon at the rate of six percent (6%) per annum from December 17, 1952 until paid; the court held that it was the obligation of Appellee to move the cars under the loading apparatus and that Appellant was rightfully entitled to withhold from Appellee the cost incurred by Appellant in continuing the movement of the cars under the loading apparatus after Appellee had refused so to do. The court further held that Appellee was entitled to the sums recovered from the government by Appellant for the extra work mentioned above, less, however, five percent (5%) of the award for administrative

expense incurred by Appellant and the further sum of one percent (1%) of the award for bond expense incurred by Appellant; the court thereupon rendered its judgment in favor of Appellee and against Appellant for the additional sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars ($13,707.94) with interest at six percent (6%) from April 1, 1953 until paid.

It is from only a part of this judgment that Appellant has appealed, namely, the award of Nine Thousand Eight Hundred Sixty Seven and 87/100 Dollars ($9,867.87), together with interest at the rate of six percent (6%) per annum from December 17, 1952 until paid, and interest at six percent (6%) per annum upon the sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars ($13,707.94) from April 1, 1953 until paid.

QUESTIONS PRESENTED

1. Was there any competent, satisfactory evidence to support the court's findings that it was the intention, agreement and understanding of the parties that Appelee would be furnished by Appellant with information as to the final quantity requirements of ballast material and that Appellee was without fault or neglect in stockpiling a quantity of ballast material insufficient to satisfy Appellant's requirements under its contract with the United States?

2. Did the court err in holding that Appellee was entitled to interest upon any of the sums found to be

owing by Appellant to Appellee?

STATEMENT OF POINTS TO BE URGED

1. The court erred in failing to hold that Appellee was bound under its sub-contract with Appellant by the terms and conditions of the general contract between Appellant and the United States, which general contract was specifically incorporated in said sub-contract by reference.

2. The court erred in holding the Appellee was not obligated to furnish all ballast material required to complete Appellant's contract with the United States.

3. The court erred in holding that Appellee was without fault or negligence in stockpiling a lesser quantity of ballast material than was necessary to complete Appellant's contract with the United States.

4. The court erred in holding that Appellant was obligated, under the terms of its sub-contract with Appellee, to notify Appellee of the exact quantity of ballast material to be produced to complete the work contemplated by Appellant's contract with the United States.

5. The court erred in failing to find that it would have been impossible for Appellant to anticipate the quantity of ballast material required to complete the work required under Appellant's contract with the United States prior to the date upon which Appellee

dismantled its crushing plant.

6. The court erred in holding that Appellee fully performed its sub-contract with Appellant as to the quantity of ballast material to be furnished.

7. The court erred in holding that Appellee was entitled to interest at six per cent (6%) per annum from April 1, 1953 until paid, upon the sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars ($13,707.94).

8. The court erred in failing to enter judgment for Appellant with respect to Appellee's demand of Nine Thousand Eight Hundred Sixty-Seven and 87/100 Dollars ($9,867.87).

9. The court erred in holding that Appellee was entitled to interest at six per cent (6%) per annum from December 17, 1952 until paid, upon the sum of Nine Thousand Eight Hundred Sixty-Seven and 87/100 Dollars ($9,867.87).

SUMMARY OF ARGUMENT

The court erred in finding and holding that Appellee fully performed its contract with Appellant. The contract between the parties contemplated that Appellee would be bound by all the provisions and obligations of Appellant in its contract with the United States which prime contract set forth an estimated quantity of ballast material but indicated that it was an estimate only and that the prime contractor would be required to furnish

all ballast material required whether or not the same would be greater than or less than the estimated quantity, and in also holding that Appellee was without fault or negligence in stockpiling a lesser quantity of ballast material than was necessary to complete the prime contract wth the United States.

The facts in the case conclusively show that Appellee was required under the terms of its agreement with Appellant to furnish all ballast material required. The contract was silent with respect to any obligation upon the part of the Appellant to notify Appellee of the exact amount of ballast material to be produced and stockpiled and that although Appellee constantly made demand upon Appellant to notify Appellee of the amount of ballast material to be produced and stockpiled, Appellant was unable to obtain that information and thus did not so notify Appellee. The facts will show that Appellant was under no obligation to furnish such information to Appellee, that there was no understanding that such information should be furnished either before the contract was executed or during the period of time in which the contract was being performed.

It will also be shown that the amounts found to be due Appellee from Appellant were not liquidated sums, that they were disputed amounts and that in such a situation, interest is not an allowable item.

STATEMENT OF FACTS

The Army Engineers invited bids, late in 1950, for work to be done in the relocation of the Southern Pacific mainline track necessitated by the construction of the Lookout Point Dam in Lane County, Oregon. The work consisted of shaping and placing roadbed topping on a sub-grade made by other contractors, the placing of ties and rails on the roadbed, and, finally, the labor and ballast material required to complete the trackage, approximately sixteen miles in length. The digging, shaping, filling, cutting of trees, etc., required in the preparation of the sub-grade was the responsibility of other contractors who were parties to prime contracts with the Army Engineers.

Appellant Lookout Point Constructors was a joint venture formed by two railroad construction companies for the purpose of bidding on and performing the contract. Appellant was the successful bidder and on January 31, 1951, the prime contract between the United States and Appellant was executed (Def. Ex. 1).

Appellee, Curtis Gravel Company, a partnership, learned of Appellant's contract in February, 1951, obtained a set of the plans and specifications from the Army Engineers and asked to bid upon a part of the work. On March 18, 1951, Appellee was invited by Appellant to bid as a sub-contractor on certain portions of the work. (R-131; Def. Ex. 21a). Mr. Marland Curtis and others in his organization visited the site, observed

the conditions and noted that work required to be done by other contractors before Appellant could proceed had been delayed. Thereafter and on March 22, 1951, Appellant submitted a detailed proposal giving prices and specifications for the performance of certain of the work required to be done by Appellant (Def. Ex. 22).

On April 12, 1951, Appellant submitted a proposed draft of sub-contract to Appellee (Def. Ex. 24). Appellee, on April 15, 1951, replied, requesting certain changes (Def. Ex. 25) and on April 24, 1951, Appellant submitted an amended agreement embracing the changes suggested by Appellee (Def. Ex. 26). This form of agreement was not returned by Appellee nor did Appellee request any additional changes (R. 131-132).

Not having heard from Appellee, Appellant, on May 12, 1951, wrote requesting performance bond if Appellee had found the agreement to be satisfactory (Def. Ex. 27; R. 59), Appellee, on May 17, 1951, returned the agreement unexecuted, explaining that difficulty had been encountered in securing a performance bond (Def. Ex. 27). Appellant then wrote that it would delay until June 10, 1951, in order to give Appellee an opportunity to secure the bond (Def. Ex. 29).

Appellee did not secure the bond until late in July, 1951, and thereafter executed the agreement but back dated it to June 10, 1951. On August 2, 1951, an original of the sub-contract was returned to Appelee; said agreement, as finally signed, was the amended sub-contract

sent to Appelee by Appellant on April 24, 1951 (R58-199; Pl. Ex. 21).

Both Appellant and Appellee commenced performance of their respective portions of the general contract late due to delays in preparation of the sub-grade by other contractors. Consequently, Appelee was unable to complete its portion of the prime contract agreed upon its part to be performed by May 15, 1951, the date set forth in the sub-contract, and both Appelee and Appellant failed to complete performance of Part A of the contract by June 1, 1951, the penalty performance date set forth in the general contract. (Def. Ex. 1). On June 25, 1951, Appellee advised Appellant that time for performance would have to be extended due to delays in performance by other general contractors. (Pl. Ex. 2a) Subsequently and on August 2, 1951, a change order was made by the Army Engineers extending the penalty date for completion of Part A of the contract until August 9, 1951. (Def. Ex. 8-a).

Performance of Part B of the general contract which involved the ballast material which is the subject of this appeal, was also held up due to delays of other prime contractors (Pl. Ex. 2-a). As a consequence, Appellee failed to make the October 15, 1951, performance date set forth in the sub-contract and both Appellant and Appellee failed to complete performance of Part B within the penalty performance date set forth in the general contract. Appellant applied for and received an extension of time for performance of both Appellant and Appellee's portions

of the work to be done under Part B and notified Appellee that the government had extended the penalty performance date by change order to June 6, 1952, (Def. Ex. 41). The Army Engineers determined that delays in performance by both Appellant and Appellee were occasioned by delays of other contractors and subsequently issued change order 8-D extending the time of performance to August 10, 1952, (Def. Ex. 8-d).

These necessary delays in performance produced additional costs and difficulties for both Appellant and Appellee. However, the prime contract made provision for such delays (Def. Ex. 1-Paragraph GC-11, Page GC-4), and authorized the Army Engineers to grant extensions of time or equitable adjustments where justified delays resulted in additional expense. The Engineers granted a number of time extensions and additional expense allowances by change order under authority of this paragraph, including the extensions of time mentioned above (Def. Ex. 8-a; 8-c; 8-e, etc).

As the delays in the progress of other contractors increased, Appellee became more and more concerned about the need to keep its ballast crushing equipment at the quarry site for a longer period than it had originally planned, and Appellee repeatedly asked the Army Engineers, Appellant, and other prime contractors to assist them with an advance determination of the contract ballast requirements. On reply to such requests for assitance, Appellant gratitously advised Curtis on September 21, 1951, that Appellant would cooperate and give

Appellee any help that it could; that Appellant had not made any calculations of ballast requirements, but that this information was being requested and that Appellant would furnish Appellee with such a determination within two weeks. (Pl. Ex. 2-b).

Appellant made an honest attempt to assist Appellee with such a determination but was unable to secure an accurate estimate due to the job conditions and delays in site availablility resulting from delays of other prime contractors (Def. Ex. 4-d; 4-g; 4-h; 32, 33). The prime contract between Appellant and the United States contained an estimated quantity of ballast material of 56,000 cubic yards but specified that that quantity was an estimate only and that "within the limit of available funds, the contractor will be required to complete the work specified herein in accordance with the contract and at the contract price or prices whether it involves quantities greater or less than the following estimates". (Def. Ex. 1)

On November 24, 1951, Appellee informed Appellant that Appellee could not assume responsibility for production of contract requirements above the estimated quantity unless Appellee was immediately advised of the extent of such requirement (Pl. Ex. 2-c). On December 3, 1951, Appellant replied that Appellee was obliged under the terms of the agreement to produce all ballast material needed for the job irrespective of the quantity required, that Appellant had endeavored as a matter courtesy, to call any obvious error in the estimates to

Appellee's attention but that there might be an overrun and that Appellant could not furnish any more definite or accurate information at the time (Def. Ex. 4-f).

Appellee did not reply to this letter, (R-74) nor did Appellee make any claim that it was excused from furnishing the rest of the contract ballast requirements because of any alleged oral agreement theretofore made by the parties (R-76). On March 14, 1952, Appellant received a report from its site superintendent that Appellee had dismantled its rock crushing plant. Appellant again reminded Appellee of Appellee's obligation to furnish all contract ballast requirements and asked to be advised of Appellee's plans to furnish additional material in case the stockpile proved to be insufficient to finish the job (Def. Ex. 4-K).

On April 5,1952, Appellee informed Appellant that Appellee was inexperienced in railroad construction, could not make a close determination of the ballast requirements, that crushing plant equipment rental ran approximately $40.00 per hour and that the plant could not be maintained indefinitely at the site without running up considerable expense. Appellee also wrote that it had done everything possible, that it was not obligated to keep the plant at the site any longer and that it had produced approximately 4,000 cubic yards of ballast beyond the contract estimate at its own risk and expense (Pl. Ex. 2-e).

On April 14, 1952, Appellant replied again remind-

ing Appellee of Appellee's obligation to produce all ballast required for the job. It was conceded that delays in work progress which were not the fault of Appellee, might make it uneconomic for Appellee to continue maintaining the plant at the site but suggested that Appellee make arrangements to purchase any additional ballast requirements from a local quarry or that Appellee produce additional ballast and make arrangements to sell any overrun to the Southern Pacific Railroad. Appellant concluded, "We do not say that you might not have a claim which can be processed successfully if you are injured in this transaction, but we do think you are obligated to perform and we expect you to." (Pl. Ex. 2-f).

On May 8, 1952, Appellant advised Appellee that the stockpile of ballast was running short, that work progress indicated that 64,000 to 65,000 yards would be required and asked to be advised of Appellee's plans for providing the balance of the requirement (Def. Ex. 4-o). Appellee made no reply to this letter (R.154). On May 9, 1952, Appellant advised Appellee by wire that the ballast supply would be exhausted within the week (Def. Ex. 5-a). On May 13, 1952, Appellant advised Appellee that Appellant was acquiring ballast from commercial sources at Appellee's expense (Def. Ex. 5-b).

Appellant contends that it was rightfully entitled to charge Appellee with the difference between the sub-contract price of the ballast material and the commercial price of the additional ballast material required for the

work. This amounted to Nine Thousand Eight Hundred Seventy-Two and 70/100 Dollars ($9,872.70) which is approximately the same sum as the court awarded Appellee ($9,867.87) in this regard.

Appellant filed requests for additional compensation with the Army Engineers covering a number of items of expense occasioned by the delays in site availability. Appellant included requests for items covering stand-by rental of Appellee's equipment and the added cost of producing ballast, and offered the proceeds of these claims to Appellee in exchange for a release by way of settlement and compromise. Appellee contended that the proceeds of the successful claims among these items should be for its account but that the rest should be paid by Appellant. Appellant contended that Appellee was being completely inconsistent, and no settlement was reached. In the spring of 1952, the Army Engineers awarded Appellant most but not all of its claim arising from stand-by rental for equipment furnished by Appellee due to delays in site availability (Def. Ex. 8-e). The change order was backdated to October 1, 1952. The claim for excess costs incurred by Appellee in furnishing ballast due to delays was less successful.

1. Appellee was obligated to furnish all ballast material required to complete Part B of the General Contract.

Appellant withheld the sum of Nine Thousand Eight Hundred Seventy-Two and 70/100 Dollars ($9,872.-70) from Appellee on account of the cost of procuring

ballast from commercial sources after Appellee failed to furnish all ballast required to complete the job. The furnishing of this ballast was called for under the following sections of the general contract (Def. Ex. 1):

> "SW-1. DESCRIPTION OF WORK. -a Work to be Done: (See Article 1 of the Contract). The work consists of furnishing all plant, labor, materials and equipment, except property specified to be furnished by the Government, and performing all work in strict accordance with these specifications and schedules and drawings forming parts thereof for constructing approximately 16 miles of track from Station 1274-00 on Southern Pacific Company's relocated main line to Station 2067-25, and a shoofly track from approximately Station 1992-65 to about Station 2033-94." (page SW-1).

> "SC-3. ESTIMATED QUANTITIES. — The quantities listed below are estimates only. Within the limit of available funds the Contractor will be required to complete the work specified herein in accordance with the contract and at the contract price or prices whether it involves quantities greater or less than the following estimates," (page SC-1).

ESTIMATED QUANTITIES (Cont'd)

Item No.	Estimated Quantities	Unit	Description of Item
3b	56,000	Cu. Yd.	Ballast material " (page SC-3)

Appellee and Appellant entered into a sub-contract (Def. Ex. 2) under which Appellant sublet certain parts of the work set forth in the general contract, including Item 3-B, under which Appellee was obligated to furnish, stockpile and load all ballast needed for the job.

The relevant portions of the sub-contract read as follows:

"WHEREAS, the Contractor is desirous of subcontracting certain parts of the work set forth in the General Contract, hereinafter in detail described," (page 1, Def. Ex. 2).

"In addition to the complete work items set forth above, the sublet work is to include a part of Part B, Item 3b, ballast material. The work sublet under this item consists of the procurement of a material site, the manufacture of the ballast material, the stockpiling of same, the construction of roads and subgrades, and the loading of the stockpiled material into railroad cars furnished by the Contractor," (page 2, Def. Ex. 2).

"1. Subcontractor agrees to furnish all the material and tools and equipment, and to perform all the work, labor and supervision necessary to complete the above described Sublet Work, at all times subject to and in full compliance with the General Contract, and to complete the same with skilled and reputable employees in workmanlike fashion to the approval and acceptance of the Principal." (page 3, Def. Ex. 2).

"Part B, Item 3b, as described in the sublet work, ballast material, $2.20 per cubic yard. Estimated quantity, 56,000 cubic yards. The quantities listed above are estimates only. The Subcontractor will be required to complete the work specified above in accordance with this contract and at the price or prices whether it involves quantities greater than or less than the above shown estimates," (page 4, Def. Ex. 2).

"19. All provisions of the General Contract and the specifications and working drawings are included as a part of this Sub-contract the same as though written in full herein." (page 9, Def. Ex. 2).

The language in the portions of both general and sub-contracts is clear, plain, and unequivocal. It is obvious that Appellee was called upon to furnish all ballast material called for under Part 3-B to complete the job, irrespective of whether such quantities exceeded or were less than the estimated quantity of 56,000 cubic yards.

The courts have regularly so held in contracts which are far less clear than the one at bar.

Maryland Dredging & Contracting Co. v. Coplay Cement Mfg. Co., (D.C.E.D. Pennsylvania) 265 Fed. 842 (1920)

Defendant cement company agreed to sell Plaintiff 225,000 (approx.) barrels of cement to be used in the construction of a particular drydock in Philadelphia. Defendant failed to supply this cement, and Plaintiff obtained same from other sources, and sued for damages. Defendant demurred, and the Court sustained the demur and ordered a new trial on the ground that Defendant's contractual obligation was to furnish the quantity of cement required for the job, and in the precise amount of 225,000 barrels. The Court said:

> "In the present case there was no averment in the statement of claim that 225,000 barrels of cement was the quantity required for the construction of the drydock, nor was there proof at the trial that that quantity was required. The contract clearly falls within the class where the quantity, although approximately stated, is to be determined according to the plaintiff's requirements for the construction of the drydock," (page 844).

Similarly:

N. S. Sherman Machine & Iron Works v. Carey Lombard, Young & Co., 227 Pac. 110 (Oklahoma, 1924) hereinafter discussed.

Tampa Shipbuilding & Engineering Co. v. General Const. Co., C.C.A. 5, 43 Fed. 2d 309 (1930).

Cragin Products Co. v. Fitch, et al, C.C.A. 8, 6 F. (2d), 557 (1925).

Brooks v. Bechill, 63 Or. 200, 124 Pac. 201 (1912).

National Pub. Co. v. International Paper Co., C.C.A. 2, 269 Fed. 903 (1920).

26 A.L.R. 2d 1099, 1125.

Furthermore, on December 3, 1951, Appellant reminded Appellee of its obligation to produce all ballast required for the job in the following words:

> "I am sure that by the terms of our agreement, that Curtis Gravel Company is obliged to produce all ballast material required, irrespective of the quantity needed. It is our thought that a very careful check of the quantity of material required might reveal an error in the specified quantity, and as a matter of courtesy, we intended to call any such obvious error to your attention." (Def. Ex. 4-f).

Appellee made no reply asserting any different understanding or construction of the contract (R. 74). Appellee could not do so in view of the plain language set forth in both the General Contract and Sub-contract.

Appellee certainly understood its obligation to provide all ballast required for the job, or it would not have made repeated efforts to try and ascertain in advance just what the requirements might be.

On May 8, 1952, Appellant advised Appellee by letter that the available quantity of ballast was inadequate, and that additional ballast would be required to complete the job (Def. Ex. 4-o).

> On May 9, 1952 Appellant sent Appellee the following telegram: "Lookout Point ballast supply exhausted this week. If no other source suggest you contact MKM and local producers for remaining requirements. Advise." (Def. Ex. 5-a).

Appellant received no reply to the above telegram, and sent the following telegram to Appellee on May 13, 1952:

> "Account your failure provide stone ballast Lookout Point relocation conformance terms your subcontract we have arranged to procure same from commercial sources at your expense. Procurement will commence May Fifteen." (Def. Ex. 5-b).

Accordingly, Appellant was entitled to obtain the additional ballast required under Item 3-B and to charge Appellee with the difference in cost of obtaining same over the agreed price under paragraph 10 of the subcontract (Def. Ex. 2, page 6), which provides: "Should Contractor take over completion of this work, the expense of completion shall be deducted from any sums that may then be due or that may thereafter become due subcontractor by virtue of this agreement."

Appellant charged Appellee with the sum of Nine Thousand Eight Hundred Seventy-Two and 70/100 Dollars ($9,872.70), constituting the difference between the cost of procurement of ballast from commercial sources and the sub-contract price.

II. APPELLEE WAS NOT EXCUSED FROM PERFORMANCE BY DELAYS OF OTHER CONTRACTORS.

Appellee contented that it should be excused from performance of its contractural obligation to furnish the ballast for the job because of delays of other contractors in that it precluded completion of Parts "A" and "B" of the contract within the original completion dates set forth therein. This contention is not well founded in law and is not reflected in the actions of the parties, and also disregards the express provisions of the general contract covering such delays.

Under the terms of the sub-contract, Appellee was obligated to complete Part A by May 15, 1951, and to complete Part B by October 11, 1951. The relevant section of the sub-contract provides as follows:

> "3. Subcontractor agrees to commence the sublet work described in Part A of the General Contract at once and to complete the same on or before May 15, 1951; to commence the sublet work described in Part B of the General Contract on May 1, 1951, and complete the same on or before October 11, 1951." (Def. Ex. 2, page 4).

Site availability was admittedly delayed due to failures of other contractors and Appellee and Appellant were both late in commencing performance of Part A of the contract. Although Appellee was obligated to complete its portions of Part A by May 15, 1951, under the sub-contract, and both Appellee and Appellant were obligated to have Part A completed by the penalty date of June 1, 1951, Appellee was unable to complete the work on time and continued to perform after the sub-contract date. Appellant claimed no penalty for Appellee's delay in performance and obtained a Change Order dated August 2, 1951 (Def. Ex. 8-a), which extended the penalty date of completion until August 9, 1951.

Appellee was also late in performing Part B and continued producing and stockpiling ballast after the sub-contract performance date of October 11, 1951. Appellant claimed no penalty for Appellee's failure to perform this part either, since performance within the agreed time would have been impossible due to delays in site availability. Both Appellant and Appellee were delayed beyond the penalty dates set for Part B. Both parties continued to perform well into the spring and summer of 1952 and Appellant obtained successive covering extensions of time for performance of June 6 and August 10, 1952 (Def. Ex. 41, 8-c, 8-d).

a. Delay of other contractors in readying the site for performance of Part B of the General Contract did not excuse Appellee from performance of the contract.

Even though Appellee continued to perform beyond its subcontract completion date of October 11, 1951, that the delays which prevented completion of the work by the original prime contract penalty dates somehow excused Appellee from its contractual obligation to provide all the ballast required under Part B. This very claim was decisively rejected in an identical situation presented in the case of

N. S. Sherman Machine & Iron Works v. Carey, Lombard, Young N *Company,* Oklahoma (1924), 227 Pac. 110.

Where the Court said:

> The element that distinguishes the authorities cited and relied upon by Appellants from those cited and relied upon by appellees is that in one instance, taking the contract as a whole, there is an agreement to furnish material for the construction and completion of a certain contract or work for which purpose the buyer is purchasing the material; ***where the purchase is for a certain and definite purpose, all of which facts are made known to the seller, and especially in contracts such as the one with which we are now dealing, ***then the amount of material necessary to complete the job or contract of the purchaser becomes the essence of the contract, rather than the specifications, wherein a certain amount of material is designated, more or less, ***we think, under the terms of this contract, the Defendant was entitled to all the cement of the brand specified in the contract, and at the price specified in the contract necessary to complete the (job)."

The provisions of the contract at bar clearly indicate that Appellant and Appelee were both obligated to perform the agreed work irrespective of delays, and that the penalty completion dates were set forth in the contract to provide liquidated damages for the government if a contractor's delays were not justified and performance time was not extended by change order. The applicable portions of the general contract provide:

"ARTICLE 5. Delays - Damages — (a) Termination for Default. If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in the contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay." (Def. Ex. 1, page 3).

(b) Damages for Delay. - If the Government does not terminate the right of the Contractor to proceed, as provided in this article, the Contractor shall continue the work, in which event he and his sureties shall be liable to the Government, in the amount set forth in the specifications or accompanying papers, or liquidated damages for each calendar day of delay until the work is completed, or if such liquidated damages are not so fixed, any actual damages occasioned by the delay." (Def. Ex. 1, page 3).

"(c) Time Extensions. — The right of the Contractor to proceed shall not be terminated as provided in this article, nor the Contractor charged

with liquidated or actual damages, because of any delays in the completion of the work due to cause which he could not reasonably have anticipated and which were due to causes beyond his control and without his fault or negligence, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, either in its soverign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargo, and unusually severe weather, or delays of subcontractors due to such shall promptly notify the Contracting Officer in writing of the causes of such delay. Upon receipt of such notification the Contracting Officer shall ascertain the facts and the extent of such delay and, if in his judgment the facts so justify shall extend the time for completing the work commensurate with the period of excusable delay. The Contracting Officer's findings of fact thereon shall constitute his decision which shall be final and conclusive on the parties hereto subject to appeal by the contractor within thirty (30) days thereform as provided in the 'Disputes' Article herein." (Def. Ex. 1, page 4).

"SC-2. LIQUIDATED DAMAGES. — In case of failure on the part of the Contractor to complete the work within the time fixed in the contract or any extensions thereof, the Contractor shall pay the Government as liquidated damages the sum of $200.00 for each calendar day of delay utnil the work called for under Part 'a' is completed or accepted, and the sum of $400.00 for each calendar day of delay until the work called for under Part 'B' is completed or accepted." (Def. Ex. 1, page SC-1).

The following paragraphs from letters sent to Appellant by Appellee during the progress of the work clearly indicate that Appellee was familiar with the clear accepted meaning of the above provisions:

> "You were advised in our letter of June 25, 1951 that an extension of time would be necessary because of delay and damage to this contractor by failure of the government to turn over the grade at the specified time. We have never received acknowledgement of this letter, however it is assumed that you did receive it. Please advise if this is not the case." (Pl. Ex. 2-a).

> "We wish to apoint out that The Utah Construction Company was unable to work in that area until late July and early August, despite the fact that last years season was very dry and early, however we do not wish to be responsible for the incurring of any liquidated damages resulting from failure to complete the slide removal." (Def. Ex. 18).

In any event, extra costs, losses or time incurred by Appellant and Appellee were expressly provided for under GC11 of the prime contract (Def. Ex. 1, P. GC4) and of the sub-contract sections 19 and 11 (Def. Ex. 2, P. 9 and page 7).

The Government granted extensions of completion time, in fact, and allowed additional costs in the case at bar because of the delays caused by other contractors. These extensions and allowances were authorized under the provisions of Paragraph GC-11 (Def. Ex. 8a, 8c, 8d, 8e, etc.). Both Appellant's and Appellee's rights in the event of delays are governed by the above mentioned contract provisions.

The law is well settled that neither Appellant nor Appellee are entitled to any consideration, excuse or benefit (other than equitable adjustments under the provisions of the general contract) because the performance of their respective portions of Part "B" of the contract was delayed by others and could not be completed within the initial period prescribed by the government, which was extended by change order.

United States v. Miller-Davis Co., et al, D.C. Conn., 61 F. Supp. 89 (1945).

H. E. Crook Co., Inc. v. United States, 270 U.S. 4, 46 S. Ct.184 (1926).

United States v. Rice, et al., 317 U. S. 61, 63 S. Ct. 120 (1942).

United States v. Howard P. Foley Co., Inc., 329 U.S. 64, 67 S. Ct. 154 (1946).

The general contract in the case at bar contains the same provisions with respect to delay, penalty clauses, liquidating damages, termination or suspension of work, etc., which are found in the contracts discussed in the above cited cases. In the case at bar, as in the cases above, the time for performance of the contract was extended by change order. In the case at bar, as in the cases above, Appellee (as well as Appellant) was admittedly inconvenienced by delays in the progress of the work of other contractors. The terms of the contract and the decisions o the authorites make it clear that Appellee did not have any vested right to complete

performance before the original penalty completion date, and that its sole remedy for delay was to seek allowance for additional costs where justified under the terms of the contracts at bar.

b. The claim that performance would be more costly to Appellee because of delays and weather conditions did not excuse Appellee from its contractual obligations.

The authorities discussed above make it clear that Appellee was obligated to produce the ballast required by the contract, even though the period of performance extended beyond the orignal penalty completion date prescribed by the Government. The same authorites also indicate that Appellee was not entitled to special consideration because performance during the extended completion period was more costly (other than Appellee's possible right to seek equitable adjustment).

The Oregon courts have likewise held that substantially increased cost of performance due to delays or other unforeseen factors does not excuse such performance.

Fleishman v. Meyer, 46 Or. 267, 80 Pac. 209 (1905).

Pengra v. Wheeler, 24 Or. 532, 34 Pac. 354 (1893).

Dermott v. Jones (*Ingle v. Jones*)
2 Wall. (U.S.) 1, 17 L. Ed 762.

Columbus R. Power & L. Co. v. Columbus, 249 U.S. 399, 63 L. Ed. 669, 39 S. Ct. 349, 6 A.L.R. 1648

Anderson v. Adams, 43 Or. 621, 74 Pac. 215 (1903).

Hoskins v. Powder Land & Irr. Co., 90 *Or.* 217, 176 Pac. 24 (1918).
2 Am. Jur. 928 (Sec. 362)

c. Appellee was not excused from performance by virtue of its alleged ignorance and unfamiliarity with railroad relocation work.

Appellee has urged that it should be excused from its obligation to provide the contract requirements of ballast because it was not engaged in the railroad business, was unfamiliar with the operation and could not determine the ballast requirements for itself in advance of the substantial completion of Part B of the General Contract (R. 56, 67; Pl. Ex. 2-e; Def. Ex. 2). This contention lacks force because both Appellee and Appellant examined the site. Furthermore, the evidence clearly shows that the job conditions were such that experienced railroad builders could not determine ballast requirements accurately in advance of contract performance requirements.

Appellee is estopped to assert its ignorance of the conditions of the job because it is bound by the following provision of the General Contract:

> "GC-3. Site Investigation and Representations. — The contractor acknowledges that he has satisfied himself as to the nature and location of the work, the general and local conditions, particularly those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads, and uncertainties of weather, river stages, tides or similar physical conditions at the site, the conformation and conditions of the ground, the character of equipment and facilities needed preliminary to and during the prosecution of the work and all other materials upon which information is reasonably obtainable and which can in any way affect the work or the cost thereof under this contract. The Contractor further acknowledges that he has satisfied himself as the character, quality and quantity of surface and subsurface materials to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from information presented by the drawings and specifications made a part of this contract. Any failure by the Contractor to acquaint himself with all the available information will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work." (Def. Ex. 1, page GC-1).

See:

Upton v. Tribilcock, 91 U.S. 45, 23 L. Ed. 203.

Danciger Oil & Ref. Co. v. Ball, (C.C.A. 5th) 54 F. (2d) 908.

Appellee is also bound by the following portion of the sub-contract:

> "WHEREAS, Subcontractor has carefully examined the General Contract, and has been furnished plans and working drawings, and has fully informed itsself as to the location and nature of the work, climate, conditions, terrain, nature and size of vegetation on the site, existing structures, location and general availability of water, fuel and power, size, type and availability of equipment required to perform the work; and other matters of local nature which might affect the cost of the work; and desires to perform, in accordance with the best engineering practices, that portion of the work described below to conform to the specifications and working drawings of the General Contract:..." (Def. Ex. 2, pages 1, 2).

Appellee in fact visited the site of the job and studied the conditions of the job (R. 61, 89).

III. APPELLANT WAS UNDER NO OBLIGATION TO NOTIFY APPELLEE OF THE QUANTITY OF MATERIAL TO BE STOCKPILED

The Court has found that it was the "intention, agreement and understanding of the parties" that Appellee would be furnished with final quantity requirements so that Appellee could reasonably supply the required stockpile within the period contemplated by the subcontract and that Appellant failed to give Appellee the information. The Court further found that Appellees was without fault or neglect in stockpiling the

the quantity which was insufficient to satisfy Appellant's requirements. (R. 27-28).

Appellant submits that there is no sound basis for these findings nor is there to be found any competent or satisfactory evidence to support the same.

The obligation upon Appellant's part to furnish all ballast material required for the work is spelled out in the sub-contract and has been discussed in the forepart of this brief. In order to find a duty upon Appellant's part to notify of quantity, it is necessary to find some modification of the written agreement, inasmuch as no requirement of notification is found in the writing, either upon the part of the Army Engineers in the prime contract, or upon Appellant's part in the sub-contract. Upon what evidence must the Court have based these findings?

(a) The alleged oral conversations at Pasco.

Marland Curtis, of Appellee, testified that L. W. Huncke, of Appellant, about April 1, 1951, during negotiations leading to the execution of the sub-contract, assured Appellee that he would advise of the final quantity so that it could be stockpiled on time (R. 56). Mr. Curtis admitted that the contract did not contain any such provision but said that "it was agreed prior to the signing of the contract and was substantiated in a letter" (R. 70-71). David E. Thompson, of

Appellee, testified that it was his "understanding" that Appellant was obligated to notify Appellee of quantity requirements but that he did not consider whether it was a matter of courtesy or commitment (R. 111-114).

At the meeting, on or about April 1, there were present Mr. Curtis, Mr. Thomspon and Mr. Huncke. (R. 110). Mr. Huncke, of Appellant, flatly denied that any such representation was made (Record 141).

> "ORS 41.740 -Parol Evidence Rule. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or imperfection of the writing is put issue by the pleadings or where the validity of the agreement is in fact in dispute. However, this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term agreement, includes deeds and wills as well as contracts between parties."

ORS 42.220, referred to in the foregoing section, relates to the construction of an instrument and authorizes the submission of evidence of the circumstances under which it was made, including the situation of the subject in the parties in order that the judge may be

placed in the position of those whose language he is interpreting. Here, however, there is no ambiguity as the contract is completely silent as to notification of quantity.

> "ORS 41.350 - Conclusive Presumptions. The following presumptions, and no others, are conclusive: (3) The truth of the facts recited from the recital in a written instrument, between the parties thereto, their respresentatives or successors in interest by a subsequent title; but this rule does not apply to the recital of the consideration."

In an Oregon case, American Contract Company v. Bullen Bridge Company, 29 Or. 549, 46 Pac. 38, damages were sought for an alleged breach of contract. Defendant entered into a contract with the City of Portland under which it agreed to furnish the necessary labor and materials for the construction of a bridge across the Willamette River. The specifications demanded crushed rock for the concrete filling to be used in the piers supporting the structure and Defendant represented to Plaintiff that it would require for such purposes between 3,500 and 4,000 cubic yards of crushed rock. Plaintiff agreed to supply the quantity required and delivered 638 yards but Defendant refused to accept any more of the rock. The written contract, however, consisted of an exchange of letters which specified only that Plaintiff would furnish crushed rock on scows at the bridge site for $1.35 per cubic yard. The Defendant replied that the proposal was accepted providing that the crushed stone was to be

acceptable to the engineer in charge. The Court observed that this did not constitute an undertaking on the part of either party to do anything except to pay and accept $1.35 per cubic yard for crushed rock and that there was no obligation to deliver or accept any given quantity of material. The Court added that the acceptance of a quantity of the rock clearly showed the contract existed and that while the rule of law is subtle that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid instrument that the rule does not apply in cases where a part only of the contract is reduced to writing. The Court quotes from Church v. Proctor, 66 Fed. 240 where an exchange of letters constituted an agreement between Church to furnish fish to Proctor for the remainder of the calendar year at $1.00 per barrel and Proctor agreed to pay the purchase price therefor. It was contended that the written contract did not constitute the entire agreement between the parties and evidence was introduced tending to show that Church had agreed to deliver at least 100 barrels of fish each day. The Court said that the writings, taken together, constituted a complete legal engagement and that evidence of an express oral agreement between the parties at an earlier day was incompetent for the reason "that it reads into the written contract an element not necessarily a part thereof." The Court added that the writings constitute one of those common agreements where one person agrees to supply for a stated price and another person agrees to buy, all the articles in a certain line required

for his family use or for his business during a certain period, that such a contract is not indefinite for the reason the requirements may be approximately known and the quantities are to be determined by the reasonable demands of the family or the business. The Court added that by the terms of the contract expressed in writing, Church in effect agreed to deliver and Proctor in effect agreed to receive such quantities of fish as might be reasonably required by his business to be delivered and received during the period and at the place and price designated in the contract, that Proctor was not required to receive and Church was not bound to deliver more than was reasonably required by the business to which the contract had reference, that from the nature of the subject matter to which the contract related the quantity was necessarily uncertain, that Proctor's requirements were subject to fluctuations incident to the season and demands of the market and Church's catch was subject to weather and other elements of uncertainty. The Court added that the contract was complete on its face and evidence of any prior oral agreement to deliver daily a specific quantity of fish was inconsistent with its meaning and therefore incompetent.

Here the contract (Def. Ex. 2) was complete and left nothing to be implied.

In Sund & Co. v. Flagg and Standifer Co., 86 Or. 289, 168 Pac. 300, we find the Court stating that:

"Having concluded that parol evidence cannot

be employed to add a term to a written contract unless it apears from an inspection of the writing interpreted in the light of the circumstances under which it was made, the situation of the subject of the instrument and the parties to it, that the writing is incomplete, it yet remains to determine whether the documents presented here are complete contracts. Turning to the writing signed by the Plaintiffs, it will be seen that the Sund partners agreed to do the construction work between certain stations and the Defendant agreed to pay certain prices for certain kinds of work. It is true that the first paragraph refers to a profile, directions of the Defendant, and rules, specifications and instructions given by the Chief Engineer of the Silver Falls Timber Company, but these provisions relate to the manner of performing the work and are no longer of any moment for the reason that the work has been completed in the manner agreed upon. Every element necessary for complete contract is found in the writing. Not a word can be found in the instrument which contains the slightest suggestion that the parties agreed that they would be bound by the final estimates of the Chief Engineer. The writing is entirely silent upon that subject. It may be true that contracts with station men usually contain the stipulation contended for by the Defendant but the answer is that this instrument does not contain such a stipulation. The parties chose to reduce their oral agreement to writing and upon inspection the document appears to contain a complete contract. The prior oral agreement made in September, 1912, may have included the estimates of the Chief Engineer; but if the oral agreement did not embrace such a stipulation, the parties left it out when they reduced the agreement to writing and since the writing now appears to contain a complete contract, the party claiming to be prejudiced is without remedy in this proceeding."

In Hyland v. Oregon Agricultural Co., 111 Or. 212, 225 Pac. 728, we find the following language:

> "It is a substantive rule of law that as between the original parties to a contract and their privies, in the absence of fraud, mistake in fact or illegality in the subject matter of the contract, where the parties have entered into a contract which is complete in itself and which has been reduced to writing, it is 'conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing'; and that parol evidence, that is, evidence extrinsic to the writing itself, is inadmissible for the purpose of adding to, subtracting from, altering, varying or contradicting the terms of the written contract or to control its legal operation or effect, and that all oral negotiations or stipulations between the parties preceding or accompanying the execution of the written contract are regarded as merged in it: (Citing authority)."

This rule is further enunciated in the Oregon case of Webster v. Harris, 189 Or. 671, 22 Pac. (2d) 644. In this case, the agreement was as follows:

> "Wren, Oregon, March 7, 1946.
>
> Gerald Harris will sell four million feef ot logs, delivery at rate of 1-1/2 million feet per year, to be delivered to M. M. Webster's sawmill located at Harris Station.
>
> M. M. Webster will buy said logs at market price, or woods run ceiling price and pay for said logs by lumber scale the tenth of each month for lumber marketed the previous month.
>
> Seller may change from pay on lumber scale to

pay on log scale. Logs would be sealed as delivered at mill in lengths 16 to 56 feet long.

M. M. Webster
Gerald Harris"

Plaintiff Webster sought damages for the breach of the contract, alleging that the Defendant orally agreed that the logs referred to in the writing were to be cut from a particular tract of land belonging to the Defendant and that from such tract the Defendant cut and deliver 300,000 feet of merchantable logs but refused to deliver any more logs from the particular tract although there remained some 3,700,000 feet of good merchantable timber thereon. Plaintiff alleged he had performed his part of the contract to date and was ready, willing and able to perform the remainder but by virtue of Defendant's breach, he had suffered damages for which he asked judgment. Demurrer was interposed to the complaint which was overruled and the chief assignment of error is the overruling of the demurrer. Defendant contended that the original written agreement between the parties constituted an integrated contract and that as between the parties thereto, it should be conclusively presumed in he absence of fraud, mistake of fact, or illegality in the subject matter, that the writing contained the whole engagement of the parties. The Court states:

"Consideration of the language and of the written agreement leaves no doubt at to the intention of the parties. Defendant agreed to sell and Plaintiff to buy four million feet of logs. Time and place of

delivery, specifications as to length of logs and prices and terms of payment are all specified. The parties have raised no question of mistake or imperfection in the writing. The writing, in our opinion, was a completely integrated contract. The alleged oral agreement pleaded by Plaintiff conflicts with and contradicts the written contract. Under the latter, the Defendant had the right to fulfill his obligation by delivery of logs from any source available to him from time to time as deliveries were due. The oral agreement would have confined him to one particular source of logs . . . ."

"The written contract appearing on its face to be complete, and no issue having been made respecting its validity, or that it embodied a mistake or imperfection, it is to be considered as containing all of the terms of the agreement, and no evidence thereof was admissible between the parties other than the writing itself."

To the same effect is the case of Craswell v. Biggs, 160 Or. 547, 559, 560; 86 Pac. (2d) 71.

It is admitted by Appellant that no objection was made to the testimony of Mr. Curtis concerning the alleged oral conversations at Pasco. In *Taylor v. Wells*, 188 Or. 648, 217 Pac. (2d) 236, the Court states that all of the evidence relating to the negotiations and agreement between the parties was admitted without objection but that it was contended by Plaintiffs on appeal that since the terms of an option were reduced to writing, parol evidence was inadmissible to vary or contradict its terms. The Court states that:

"The rule which prohibits the modification of a written contract by parol evidence (Section 2-214, O.C.L.A.) 'is not one merely of evidence, *but is one of positive or substantive law* founded upon the substantive rights of the parties.' (Citing authority). Evidence properly falling within the inhibition of the rule does not become admissable merely because it has probative value or is not objected to. (Citing authority). It is said in 32 C.J.S., Evidence, Section 863, that there is a conflict of authority as to whether parol evidence which is inadmissible because it varies or contradicts the writing, but which has been admitted without objection, must on the one hand, be considered and given its due effect, or on the other hand, must be disregarded, in the trial court.

The Oregon court goes on to state:

"The weight of authority supports the rule that such evidence should be disregarded. Especially is this true in those jurisdictions where it is held that the parol evidence rule is one of substantive law and not one of evidence merely. (Citing authority)".

The documentary evidence in this case strongly indicates that there was no oral agreement made at Pasco. The only testimony that there was such an agreement was that of Mr. Curtis. Mr. Thompson, employed by Appellee, only testified to his understanding and Mr. Huncke of Appellant flatly denied that such a conversation had ever taken place. The contract between the parties was executed long after the date of the Pasco conversations and after a proposed draft submitted by Appellant to Appellee had been returned with suggested modifications which were all made by Appellant.

There is no mention of the alleged oral agreement in any of the correspondence of the parties and was first mentioned and asserted by Appellee during the course of the trial.

The Army Engineers, in the prime contract, indicated considerable caution in expressing the amount of ballast material required indicating that the figure of 56,000 cubic yards was an estimate only and that Appellant would be required to furnish more or less ballast material as the occasion might require. Appellant, in turn, exhibited caution in writing its sub-contract and imposed the same obligation upon the sub-contractor, Appellee, that was imposed upon Appellant as the prime contractor with the government. To hold that Appellant was required to advise as to quantity before the quantity could be ascertained would be imposing a burden upon Appellant which Appellant specifically sought to be and was relieved of by the execution of the execution of the sub-contract.

b. The letter of September 21, 1951.

On September 21, 1951, L. W. Huncke, of Appellant, addressed the Job Superintendent of Appellee concerning a number of matters, the last paragraph of which is as follows:

> "We appreciate your efforts to complete this work within the time allowed and I assure you that we will cooperate and give you any help which we can.

> We have, as yet, not made any calculations of the amount of ballast required other than the quantity as set out in the specifications of 56,000 cubic yards of ballast material. I have, however, requested that Mr. Salm and Mr. McDowell recalculate these quantities so that we can give you an accurate determination of the requirements for the work. This will be furnished you within the next two weeks."
> (Pl. Ex. 2-b)

The parties had engaged in several conversations concerning the amount of ballast required (R. 46). This letter, however, was in response to the following question proposed by Appellee in its letter to Appellant of September 14, 1951 (Pl. Ex. 2a).

> "We desire to know if you contemplate changing the contract quantity for production of ballast. Unless we are advised otherwise, we shall asume the proper quantity of ballast to be produced at this time is the equivalent of 56,000 cubic yords as measured by car measurement."

As a matter of fact, an honest effort was made upon the part of Appellant to give a more accurate estimate of the quantity required than that which was contained in the government contract. (Def. Ex. 4-d; 4-g; 4-h; 32; 33). In fact, Mr. Huncke estimated the quantity at 64,000 yards (R. 153). Over the strenuous objections of counsel, Mr. Huncke was permitted to testify that an effort was made to assist Appellee in obtaining advance information as to the amount of material which would be required for the job but that they were unable to reach a satisfactory or accurate determination of the

amount as the result of their investigation and that it was decided after various calculations and conclusions had been drawn that the matter of quantity was indeterminate at the time (R. 147).

On December 3, 1951, Appellant wrote Appellee as follows:

> "I am sure that by the terms of our agreement, that Curtis Gravel Company is obliged to produce all ballast material required, irrespective of the quantity needed. It is our thought that a very careful check of the quantity of material required might reveal an error in the specified quantity, and as a matter of courtesy, we intended to call any such obvious error to your attention . . .
> I am sorry that we are unable to give you any more definite or accurate information, and it is our suggestion that you take off the quantities from the plans and base your production of the material on the quantity which you believe will be required." (Def. Ex. 4-f)

No reply was made to this letter but Mr. Thompson of Appellee considered that it was answered by his letter of Apirl 5, 1952 (R. 114; Pl. Ex. 2-e). In the letter of April 5, Mr. Thompson referred to his inquiry of September 14, the reply of September 21, the further inquiry of Appellee of November 24 and Mr. Huncke's letter of December 3, all 1951. He states:

> "We are not railroad contractors and have no experience in the application of ballast and the amount of shrinkage, loss and waste pertinent there-

to. Subsequently we are unable to make a close determination from the plans. We recognize that we are obligated to maintain a plant for the production of ballast for the life of the original contract, which we did, however, our plant equipment without shovel and hauling equipment rents of approximately $40.00 per hour which should make it quite obious we cannot maintain a plant at the project indefinitely without building up a considerable sum for additional reimbursement. It is our opinion that we cannot reasonably be expected to make an exact estimate of the amount of ballast required. It is our further opinion that we did everything possible to obtain the final quantity of material that your organization was obligated to provide this information inasmuch as you established a completion date for ballast much earlier than the original contract completion date. It is also pointed out that we made approximately 4,000 cubic yards of ballast in addition to the contract quantity at the risk of receiving no payment for this material.. It is now our opinion after reviewing the situation carefully that we are not obligated to produce any additional ballast."

It is interesting to note that Appellee's crushing plant remained at the site until March 6, 1952 (R. 167); also, that Appellee was never required to place a crushing plant on the job and that Appellee's obligation was to produce or to furnish crushed stone ballast meeting the specifications in railroad cars, and that the material could have been purchased elsewhere and brought to the job (R. 135).

As the prime contract with the Government required the production of a sufficient quantity of ballast material to perform the work, regardless of quantity, and as

the sub-contract between Appellant and Appellee required Appellee to furnish a sufficient quantity of ballast material to complete the work, whatever that quantity might be, how then is the notification of the quantity of material required a part of the contract? The only answer could lie in the letter of September 21, 1951 (Pl. Ex. 2-d). Certainly, if Appellant could ascertain the quantity required, Appellant would have been happy to furnish that information to Appellee, but on the other hand, if that information could not be developed. Appellant was under no obligation to furnish it. (Pl. Ex. 1). The testimony before the Board of Claims and Appeals of the Army Engineers, is illuminating in this regard and a perusal of that document will disclose that the amount of ballast material which was used upon the job varied materially from the theoretical requirements of the job and that reason for the larger quantity of material used is a matter of pure speculation.

We might speculate upon the result if Appellee had manufactured, for example, 20,000 cubic yards of ballast material which was not used on the job. It can be assumed that Appellee would have desired to receive payment for the surplus ballast material manufactured even though Appellant could have found no use for it.

It therefore appears that the assumption of the burden of producing the required quantity of ballast material was by the sub-contract imposed upon Appellee.

Long after the execution of the sub-contract, Appellee sought to relieve itself of this burden by constantly making inquiry of Appellant and that Appellant was not in a position nor could Appellant place itself in a position to give this requested information.

The letter of September 21, 1951 (Pl. Ex. 2-b) constitutes a gratitious offer upon the part of Appellant and, Appellant, upon learning that it would be impossible to give a definite quantity, was unable to advise Appellee.

The letter of September 21, 1951 did not constitute a modification in any respect of the sub-contract between Appellant and Appellee.

> "Generally speaking, the sufficiency of the consideration for the modification of a contract seems to be determined by the rules that govern the sufficiency of the consideration for an original contract. Thus, the doing by one of the parties of something that such one is not legally bound to do is undoubtedly a sufficient consideration for the other's promise to modify the terms of the contract. Any new consideration is sufficient." 12 Am. Jur. 988, Section 410.

This principle was recognized in Booth Kelly Lumber Company v. Southern Pacific Company, 183 Fed. 902, decided in this Court in 1950, holding that a modification of the contract in that case was actually supported by a true and valid consideration.

In the case of Cameron v. Edgemont Investment Co., 149 Or. 396, 4 Pac. (2d) 249, damages were sought for breach of a contract for the sale and purchase of real property which Defendant agreed to sell and Plaintiff agreed to buy at a price certain, the contract containing a provision that a concrete pavement 18 feet wide should be laid in front of the lot and a city sewer installed to serve said lot, all on or before October 1, 1928. After the contract had been executed, a typewritten slip initialed by Defendant and Plaintiff was added to the contract to the effect that when the city should install the sewer, the Defendant would pay for the same and the words which obligated the Defendant to construct the sewer were deleted from the contract. The lower court held that the modification of the contract with reference to the sewer was void for lack of consideration and the Oregon Supreme Court affirmed the decision stating that

> "a modification of a contract being a new contract, a consideration is necessary to support the new agreement, as for example, where it is to extend the time for performance or payment or to release one of the parties from performance. Although some cases hold that no new consideration is necessary, the theory being that the original consideration attaches to and supports the modification, such cases are criticized in *Shriner v. Craft,* 166 Ala. 146 (51 SO. 884, 28 L.R.A. (N.S.)450, 139 Am. St. Rep. 19) where the Court said: 'While there are some expressions in the cases which seem to dispense with the necessity of a consideration to be a modification of contract, yet a modification can be nothing but a new contract and must be supported

by a consideration like every other contract. *George v. Lane,* 80 Kan. 94 (102 P. 55); *Weed v. Spears,* 193 N. Y. 289(86 N. E. 10). Mutual obligations assumed by the parties at the time of the modification without doubt constitute a sufficient consideration. If one of the parties does not assume any obligation or release any right, then the promise by the other is a nudum pactum and void: *Grath v. Mound City Roofing Tile Co.,* 121 MO. App. 245 (98 S.W. 812).

"In the present case the Defendant, by the original contract, plainly agreed to install a sewer at its own expense to serve the lot. In the proposed modification nothing is added to the promise of Defendant. The modification purports to release the Defendant from its obligation to install the sewer on or before October 1, 1928, which was a valuable right in favor of the Plaintiff. This was proposed to be released without any consideration or benefit passing from Defendant to Plaintiff, or any detriment to the company. The proposed modification was to change the time of installation of the sewer from the definite date of October 1, 1928, to an indefinite, visionary promise to pay for the assessments for the sewer, if it were ever constructed by the city, which promise was not worth one farthing to Plaintiff. There was mutuality expressed in the rider."

The Court goes on to say that it is a rule that a promise to pay one for doing something he was under a prior legal duty to do is not binding for want of a consideration.

To the same effect is *Craswell v. Biggs,* 160 Or. 547, 86 Pac. (2d) 71, holding that a written instrument may be modified by a subsequent parol contract, but evidence

must be clear, convincing and conclusive and must be predicated upon a legal and valid consideration.

In *Smith v. Phillips Pipeline Company,* 128 F. Supp. 61, recovery was sought for a pipeline and Plaintiffs urge that they are entitled to receive more money than the amount called for in the writing for the reason that inclement weather, not within the contemplation of the parties, was encountered during the pipeline work. Plaintiffs contend that the Defendant assured them that they would lose no money if they continued the work called for in the original written agreement during the unforeseen inclement weather. The Court found that the agreement was unenforceable due to lack of consideration running to the promissor. The Court pointed out that the contention was made that the consideration was the detriment suffered by the Plaintiffs in continuing to lay pipe in conformity with the written specifications at a time when weather conditions were extremely adverse but that "it is fundamental that the discharge of a promise previously made and for which the promissor is legally obligated cannot stand as a new and separate consideration for a subsequent agreement. This principle is directly applicable to the instant case. All of the work done by Plaintiffs was work specifically called for in the written contract."

The letter (Pl. Ex. 2-b) constitutes a mere offer upon the part of the Appellant to extend aid to the Appellee in the circumstances. Events prove that no one

was able to predict at the time the amount of ballast required. Appellant on December 3, 1951, by letter (Def. Ex. 4-f) indicated that the terms of the agreement bound Appellee to produce the material required, regardless of quantity. Appellant indicated in that letter it was unable to give any more definite or accurate information.

Appellee chose to disregard the warnings which Appellant gave Appellee, although Appellee continued to leave its plant at the site until about March 6, 1951. Appellee refused to make any effort whatever to procure ballast material from other sources in order to fullfill its contract requirements but chose to stand on what Appellee stated were its legal rights.

It is submitted that the competent and substantial evidence necessary to a finding that it was the agreement of the parties that notice of final quantities would be given is not present in this case. The disputed conversations at Pasco cannot be considered in the light of the Oregon statutes and decisions and the indication that the information with respect to quantities would be furnished would constitute a modification of the contract, wholly unsupported by any consideration whatever.

IV. APPELEE IS NOT ENTITLED TO INTEREST

The trial court awarded interest upon the sum found to be due by Appellant. The Oregon statute, ORS 82.010, allows interest at 6% per annum upon:

> "(a) All moneys after they become due; but open accounts bear interest from the date of the last item thereof.
>
> (c) Money received to the use of another and retained beyond a reasonable time without the owner's express or implied consent.
>
> (d) Money due upon the settlement of matured accounts from the day the balance is ascertained."

The foregoing are the only provisions of the code section which might have possible application.

There are only two types of interest, namely, contractual interest or interest as damages which are recognized by law. *City of Seaside v. Oregon S. & C. Co.*, 87 Or. 624, 634. Contractual interest involves either conventional interest (where parties have agreed to pay interest at a specific rate) or legal interest (where parties have contracted for payment of interest but have not specified the rate). Interest as damages has been defined as the compensation awarded as damages for the withholding of moneys and is based upon the theory that the injured party could have employed the funds to a profit during the period of withholding. 17 OLR 51.

The sub-sections of ORS 82.010 cited above contemplates interest as damages. As the law review cited above points out, Oregon early adopted the conservative rule that interest as damages would be awarded only where the principal sum is liquidated and refused the New York rule which allows interest when, although the principal sum is unliquidated, it might be ascertained by calculation with reasonable certainty by reference to existing market values. In following the rule regarding interest as damages the cases indicate that damages are to be deemed liquidated, in contract cases, only for the breach of a promise to pay a definite sum of money and in tort cases for the wrongful acquisition or detention of a sum of money.

The Restatement of the Law of Contracts, Section 337, adopts both the conservative rule, the New York rule that interest will be allowed where value is ascertainable by mathematical calculation from a standard fixed in the contract or from established market price and cites a third, that where the contract is broken and is a kind not specified under the conservative rule, interest might be allowed as justice requires it. Thus, the Restatement would permit interest as damages for the breach of a contract of almost any kind or nature.

A prerequisite to the recovery of interest as damages is that the sum of money detained after breach be a definite sum. In 1906, the Oregon Court deviated somewhat by permitting interest to be recovered in a case where wheat

was delivered to a warehouse and either like wheat was to be delivered to the depositor or paid for in cash at market, but the warehouse was burned and the wheat was destroyed. Interest was allowed on the value of the wheat from the date of demand. It is pointed out here that the commodity had a definite market value from day to day so that the value was very easily ascertainable. *Savage v. Salem Mills Co.*, 48 Or. 1; 85 Pac 69. Interest on matured accounts appears to be allowable from the day the balance is ascertainable but there are four prerequisites to recovery under this provision: there must be a mutual account, the account must be matured, the matured account must be settled and it must be shown that the Defendant failed to pay the balance thus ascertained. 17OLR 51.

The Court has cited *Public Market Co. v. City of Portland* 171 Or. 522, 625 (R. 24) as the basis for the allowance of interest. Here the city contracted to purchase a building to be constructed for use as a publicly owned market and the purchase price was to be paid out of a special fund to be raised by sale of public utility certificates. After the building had been constructed and other conditions met, the city completely repudiated the entire transaction, having made no effort to create the special fund by the sale of the certificates. The Oregon Court held this repudiation wrongful and without justification. The Court points out that the failure to perform the duty of creating the fund was a tort to which the city had to respond and found the measure of damages to be the contract price less the value of the property and

allowed interest, thus adopting the New York rule that the sums were readily ascertainable by resort to market values. The city contended that the damages were unliquidated but the Court held that the 'pecuniary amount was either ascertained or ascertainable by simple computation or by reference to generally recognized standards such as market price, and where 'the time from which interest, if allowed, must run, - that is, a time of definite default or tort-feasance, - can be ascertained.' The Court held both elements to be present.

In 1944, only a short time after the Public Market case had been decided, the Oregon Court rendered its decision *In re McKinney's Estate, Tracy v. Pioneer Trust Company,* 175 Or. 28; 149 Pac. (2d) 980, 151 Pac. (2d) 459, where the Court stated that as the demand was based on an implied promise to pay the reasonable value of services there was no understanding as to the value thereof, that since there was no agreement as to the date the compensation should be paid, that since no demand was made for payment, that as the services were of such a nature that their value was not ascertainable by computation or by reference to well known standards of value, and since the claim was subject to offset, interest upon the claim was not allowable. The Court stated:

> "We do not consider the rule in *Public Market Co. v. City of Portland* . . . .as to the allowance of interest, controlling here, because it is based upon an entirely different set of facts."

Thus, we find the Oregon Court leaving the strict conservative rule and adopting the New York rule but making its application quite limited in its latest decision on the subject. In re McKinney's Estate, supra. The Oregon Court has not adopted the third and most liberal rule of the Restatement.

This situation does not fall within the rule with regard to the settlement of matured accounts nor money received to the use of another and must be limited to the sub-section of the code relating to 'all moneys after they become due'.

The facts here do not meet the test as laid down by the Oregon Court.

We have earnestly contended that Appellee is not entitled to judgment for the amounts withheld due to extra costs of ballast material involved by Appellee's breach of its contract. However, in the event this Court does not accept our position, then we contend that interest is not allowable as the situation does not come within the purview of the Public Market case, supra. The claim of Appellee involved Eleven Thousand Seven Hundred Forty-Two and 77/100 Dollars ($11,742.77) composed of two items, namely, the amount withheld for extra costs of material and the amount expended by Appellee in moving cars for loading. Appellant, on the other hand, contended that Appellee was responsible for moving cars, that Appellant was compelled to take over by

virtue of Appellee's refusal, expended One Thousand Eight Hundred Seventy Four and 88/100 Dollars ($1,874.88) in so doing and was entitled to payment therefor (R. 6).

The Court found that the moving of cars was indeed Appellant's responsibility and refused to allow recovery with respect to that part of the demand (R. 31).

The award of interest upon the sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars ($13,707.94) (R. 33) was based upon a claim of Fourteen Thousand Five Hundred Eighty-Two and 92/100 Dollars ($14,582.92) which Appellee contended was owing by Appellant as the result of a claim filed with the Army Engineers by Appellant (R. 10). The Court found that Appellant was entitled to retain 5% of the award for Appellant's administrative expense and 1% for Appellant's bond costs incurred (R. 31).

In neither of these instances could resort have been made to the contract to obtain the standard by which the sums due could have been liquidated. Nor could any reasonable market value have been applicable nor could the result have been reached by mathematical calculation. Appellee quit moving cars in the midst of the job, asserted the contract for loading the material in the cars did not involve moving cars and left Appellant to move the cars if the material was to be loaded. This was rather highhanded and the Court found the

obligation to be that of Appellee. The claim for ballast material was merged in and was a part of the claim for for moving cars and Appellee was adamant with respect to payment of the entire claim.

The claim for Fourteen Thousand Five Hundred Eighty-Two and 92/100 Dollars ($14,582.92) made by Appellee entertained no provision for handling and other charges incurred by Appellant in processing this claim. The award was less than the amount sought.

Thus, both of these claims were subject to reductions not ascertainable in the circumstances and were therefore not liquidated claims.

The sub-contract (Def. Ex. 2) contains the following paragraph:

> "16. Subcontractor agrees to submit to the Contractor each month invoices for the payment of units of work performed by Subcontractor during the preceding monthly period, as determined and substantiated by estimates of the Principal, itemized in such form and suported by such evidence as may be required by the Contractor, or by the General Contract. Contractor, within thirty (30) days after presentation of such invoices and approval thereof by Contractor, agrees to pay Subcontractor a sum equivalent to ninety percent (90%) of such work performed during such monthly period. Upon completion of the sublet work by Subcontractor, and after acceptance by Principal of the sublet work described in specifications and working drawings, and receipt of a Release Agreement executed by

> Subcontractor, to pay Subcontractor the balance then due Subcontractor under the terms hereof within thirty (30) days."

Under this provision, Appellant was entitled to withhold ten percent (10%) of the total sums due under the sub-contract until completion of the work required of Appellee, the acceptance of the work by the Army Engineers and the receipt of a release of all claims of Appellee against Appellant. Such a release has never been given by Appellee.

Appellant and Appellee attempted to negoitate a settlement of all disputes. At that time, Appellant offered to deliver to Appellee the sum of Fourteen Thousand Five Hundred Eighty-Two and 92/100 Dollars ($14,582.92) in the event that the release called for in the subcontract would be given and indicated Appellant had always been ready to deliver up the sum under the conditions expressed. Appellant also requested an indemnification as provided in Paragraph 6 (Def. Ex. 2). Appellant's prime contract was subject at the time of the trial of this case to audit and clearance by the General Accounting Office of the United States, which left Appellant vulnerable to disapproval of the amounts paid under the claim by the Army Engineers and subjected Appellant to reimbursing the government therefor (R. 154-159, 201-207).

Such were the conditions which faced Appellant in settling its dispute with Appellee. How Appellant at that time could have paid the amounts found by the Court to have been due Appellee is beyond comprehension.

CONCLUSION

For the reasons stated herein, the judgment of the District Court should be reversed with respect to the two parts thereof from which this appeal is taken.

Respectfully submitted,

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